

1 The Honorable Kymberly K. Evanson
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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

9 JAMON RIVERA, et al.,

NO. 2:24-cv-00677-KKE

10 Plaintiffs,

DEFENDANTS' SUPPLEMENTAL
BRIEF ON THE IMPACT OF I-2066 ON
THIS LITIGATION

11 v.

12 KJELL ANDERSON, et al.,

NOTE ON MOTION CALENDAR:
DECEMBER 12, 2024

13 Defendants.

I. INTRODUCTION

Defendants submit this supplemental brief to address the impact of Initiative 2066 on (a) Defendants' pending motion to dismiss, and (b) any other issues presented in this case.

4 As to the motion to dismiss, I-2066 does not alter the legal analysis. This lawsuit was not
5 appropriately brought in federal court and must be dismissed. Developments since I-2066's
6 passage have reinforced this point. Plaintiffs attempted to avoid the jurisdictional bars of the
7 Eleventh Amendment and Article III by arguing that local code officials cannot be the proper
8 defendants because they have no "discretion." Yet following I-2066's passage, Plaintiffs' own
9 representative association said the opposite—writing to local code officials explicitly urging
10 them to use their discretion to waive the same Code requirements challenged here. Plaintiffs
11 cannot have it both ways. Uncertainty as to how the Codes will be enforced by local officials,
12 given the differing views on I-2066's legal impact, only underscores the lack of jurisdiction.

13 As to the case more generally: I-2066 does not, standing alone, moot this case. This is
14 because I-2066 does not directly amend the challenged Energy Codes or specifically direct the
15 State Building Code Council to make changes to the Codes. Instead, I-2066 provides (as most
16 relevant here) that the Codes may not discourage the use of natural gas for heating or other
17 purposes. However, I-2066 has prompted developments that may themselves render this
18 litigation moot or otherwise significantly affect the nature of the merits arguments. First, the
19 Council unanimously passed a resolution to assess what changes to the Codes may be necessary
20 to comply with I-2066. This process may result in the Council engaging in rulemaking that
21 substantively changes the Energy Codes. Second, state litigation filed due to I-2066's passage
22 may result in a court order or orders that similarly alters the Codes. Thus, if the Court does not
23 grant Defendants' motion to dismiss, Defendants will likely request that the Court exercise its
24 inherent authority to stay the case based on these ongoing developments.

II. BACKGROUND ON I-2066 AND THE COUNCIL'S RESPONSE

I-2066 became effective on December 5, 2024. As relevant to this case, I-2066 amends

1 chapter 19.27A RCW, which governs the Washington State Commercial and Residential Energy
 2 Codes, to provide that the Codes “may not in any way prohibit, penalize, or discourage the use
 3 of gas for any form of heating, or for uses related to any appliance or equipment, in any building.”
 4 Washington Initiative Measure 2066, § 6(3) (2024) (amending RCW 19.27A.020). I-2066
 5 further provides that “[w]hen amending a code under this section, the state building code council
 6 shall not in any way prohibit, penalize, or discourage” the use of natural gas. *Id.* § 7(4) (amending
 7 RCW 19.27A.025); § 8(2) (amending RCW 19.27A.045).

8 I-2066 leaves in place existing statutory mandates, including that the Codes “be designed
 9 to . . . [c]onstruct increasingly energy efficient homes and buildings,” *id.* § 6(2)(a); “[r]equire
 10 new buildings to meet a certain level of energy efficiency, but allow flexibility in building
 11 design, construction, and heating equipment efficiencies within that framework,” *id.* § 6(2)(b);
 12 “increase the energy efficiency of typical newly constructed . . . buildings,” *id.* § 7(1)(a); § 8(1);
 13 and “incrementally move towards achieving” a “seventy percent reduction in annual net energy
 14 consumption,” RCW 19.27A.160(2).

15 The 2021 Energy Codes encourage the construction of energy efficient buildings, as
 16 statutorily mandated, including through use of electric heat pumps, water heaters, and other
 17 appliances. They do not require or prohibit the use of any particular type of appliance or energy
 18 source in new construction. WAC § 51-11R-40621; WAC § 51-11C-40620. Instead, the Codes
 19 provide multiple performance pathways for compliance, allowing continued use of natural gas
 20 while promoting the construction of increasingly efficient buildings. *Id.*

21 Shortly after it became clear that I-2066 would pass, the Council received a letter from
 22 the Building Industry Association of Washington (BIAW), a building construction industry
 23 group. Declaration of Dustin Curb in Support of Defendants’ Supplemental Brief on Impact of
 24 I-2066 on This Litigation (Curb. Decl.), Ex. A. The letter stated BIAW’s position that the 2021
 25 Energy Codes will be invalid under I-2066 and threatened litigation if the Council did not take
 26 action to bring the codes into compliance with I-2066 by December 5, 2024. *Id.*

1 On November 22, 2024, the Council held a special meeting to discuss and vote on how
 2 to respond to I-2066. Curb Decl. ¶ 4. The Council unanimously passed a motion noting that the
 3 Council was endeavoring to comply with I-2066, as well as existing state and federal law, and
 4 stating the Council's intent to "achieve the complex and entangled goals with which we have
 5 been asked to comply, while minimizing uncertainty in regulation and disruption for the
 6 construction industry." Curb Decl., Ex. B. To that end, the motion directs the Council's Energy
 7 Code Technical Advisory Group (TAG) to continue with the ongoing process of amending the
 8 2024 Energy Codes and to, if needed, bring off-cycle recommendations to update the 2021
 9 Energy Codes. In particular, the TAG was directed to recommend rules that may be required to
 10 meet I-2066's requirement that the Codes not penalize, prohibit, or discourage natural gas, while
 11 continuing to (1) comply with the Energy Policy and Conservation Act; (2) meet existing state
 12 statutory requirements, including the requirement to incrementally increase energy efficiency
 13 with each update; and (3) not provide artificial advantage in meeting energy efficiency standards
 14 to natural-gas energy sources or appliances. Curb Decl., Ex. B. The Council directed Council
 15 staff to keep the 2021 Energy Code in effect until off-cycle rulemaking was complete or until
 16 otherwise directed by a court, and to communicate updates to local governments tasked with
 17 implementing and enforcing the Codes. *Id.* To this effect, a CR-101 preproposal notice of
 18 rulemaking will be filed. Curb Decl. ¶ 5.

19 III. ARGUMENT

20 **Motion to Dismiss.** I-2066's passage does not alter the legal analysis: Plaintiffs' federal
 21 lawsuit remains barred under the Eleventh Amendment and for lack of Article III standing. I-
 22 2066 has reinforced this conclusion by injecting uncertainty as to how the Codes will be enforced
 23 at the local level, given the differing views on its legal implications. As Defendants' motion
 24 maintained, this lawsuit does not fall into the narrow *Ex parte Young* exception to state sovereign
 25 immunity because state law confers enforcement authority over the Codes exclusively to local
 26 officials, who approve or deny building permit applications and prosecute violations. Dkt. # 48

1 at pp. 9–13; Dkt. # 53 at pp. 3–6. For similar reasons, under Article III’s traceability prong, any
 2 injury caused by actual or threatened enforcement of the Codes would be traceable to the local
 3 official with enforcement authority, not to Defendants. Dkt. # 48 at pp. 19–20; Dkt. # 53 at p. 9.

4 Plaintiffs attempted to avoid this conclusion by claiming that this authority is in name
 5 only and gives local officials “no discretion.” Dkt. # 52 at pp. 11–18, 23–24. Yet, following
 6 I-2066’s passage, BIAW—on behalf of its member businesses, including several of the plaintiffs
 7 here—sent letters to local building code officials describing the 2021 Energy Codes, specifically
 8 Section R406, as “unenforceable” in light of I-2066, and explicitly urging local officials to “use
 9 their discretion to waive” Code requirements. Declaration of Sarah Smith-Levy in Support of
 10 Defendants’ Supplemental Brief on Impact of I-2066 on This Litigation (Smith-Levy Decl.) ¶
 11 3–4, Exs. A, B. BIAW pointed to specific Code sections granting local officials this discretionary
 12 authority. *Id.* And it separately wrote to county prosecutors and city attorneys asking for their
 13 assistance in ensuring local officials exercised this authority. Smith-Levy Decl. ¶ 5, Ex. C.

14 These letters, and the reality that they reflect, reinforce the jurisdictional bars here. Local
 15 officials are solely responsible for Code enforcement under Washington law, and thus Council
 16 members and the Washington State Attorney General do not fall under the narrow exception to
 17 state sovereign immunity set forth in *Ex parte Young*. And the uncertainty over whether and how
 18 local officials will enforce the Code requirements in conjunction with I-2066 reinforces both the
 19 speculative nature of Plaintiffs’ claimed injuries, and that any such injuries would be traceable
 20 to local officials, not the Council members (or the Attorney General).

21 **Mootness.** I-2066 does not, standing alone, moot this litigation. “In general[,] a case
 22 becomes moot when the issues presented are no longer ‘live’ or the parties lack a legally
 23 cognizable interest in the outcome.” *Pub. Utilities Comm’n of State of Cal. v. FERC*, 100 F.3d
 24 1451, 1458 (9th Cir. 1996) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183,
 25 71 L.Ed.2d 353 (1982)) (cleaned up). Typically, courts have not found mootness when an agency
 26 begins rulemaking, even if such rulemaking would ultimately adopt the plaintiff’s position.

1 || *Vanscoter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990). This is because of “[t]he protracted
 2 nature of agency proceedings and the uncertainty as to whether and when the proposed regulation
 3 may be adopted.” *Id.*

4 Here, I-2066 does not itself amend the Energy Codes or specifically direct any changes
 5 to the Codes. The Council has instructed the Energy Code TAG to continue its current work on
 6 the 2024 Energy Codes and to “bring forward off cycle recommendations . . . that may be
 7 required to meet the 2066 provision that gas not be penalized, prohibited or discouraged relative
 8 to other energy sources.” Curb Decl., Ex. B. That process has just begun, and it is not yet clear
 9 what changes to the Codes, if any, the Council will adopt. Moreover, the 2021 Energy Codes
 10 will continue to be in effect until this process is complete or until a court orders otherwise. *See*
 11 Curb Decl., Ex. B. Thus, the passage of I-2066 itself has not mooted this action. *See, e.g.*,
 12 *Vanscoter*, 920 F.2d at 1448.

13 Further developments may render this case moot, however. These include potential
 14 amendments to the Codes via the off-cycle rulemaking process, and/or potential court orders in
 15 state court cases challenging the Codes based on I-2066’s legal impact and, separately,
 16 challenging the constitutionality of I-2066.¹ These developments may result in substantive
 17 changes to the 2021 Energy Codes that could moot this litigation and, in any event, would
 18 substantially impact the merits arguments. Thus, if the Court denies Defendants’ motion to
 19 dismiss, Defendants will likely request a stay of this case based on these circumstances. Such a
 20 stay would promote the orderly course of justice and, in preserving the status quo, would not
 21 harm Plaintiffs, who have not moved for preliminary relief despite the 2021 Energy Codes being
 22 in effect through the course of this litigation.

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26 ¹ BIAW has indicated its intent to bring litigation challenging the Codes under I-2066 (Curb Decl., Ex. A),
 and other groups are expected to imminently file a constitutional challenge to I-2066.

1 DATED this 6th day of December 2024.
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